

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

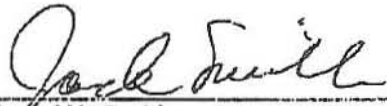
Beirne, Mark Joseph,)
)
) Plaintiff,)
 v.)
)
) State of Alaska, Medical Board,)
)
) Defendant,)
 _____)

Case No. 3AN-07-11710CI

ORDER

For the reasons placed on the record on 20 November, 2008, this case is remanded to the Medical Board for reconsideration of Dr. Beirne's application. The Board is not prohibited from reinstating a voluntary surrendered license per 12AAC 40.965 (a) (1) (C).

11-20-08
Date



Jack W. Smith
Superior Court Judge

I certify that on 11-20-08
a copy of the above was mailed to each of the
following at their addresses of record:
Van Flein, Auth



Rmeade / Administrative Assistant

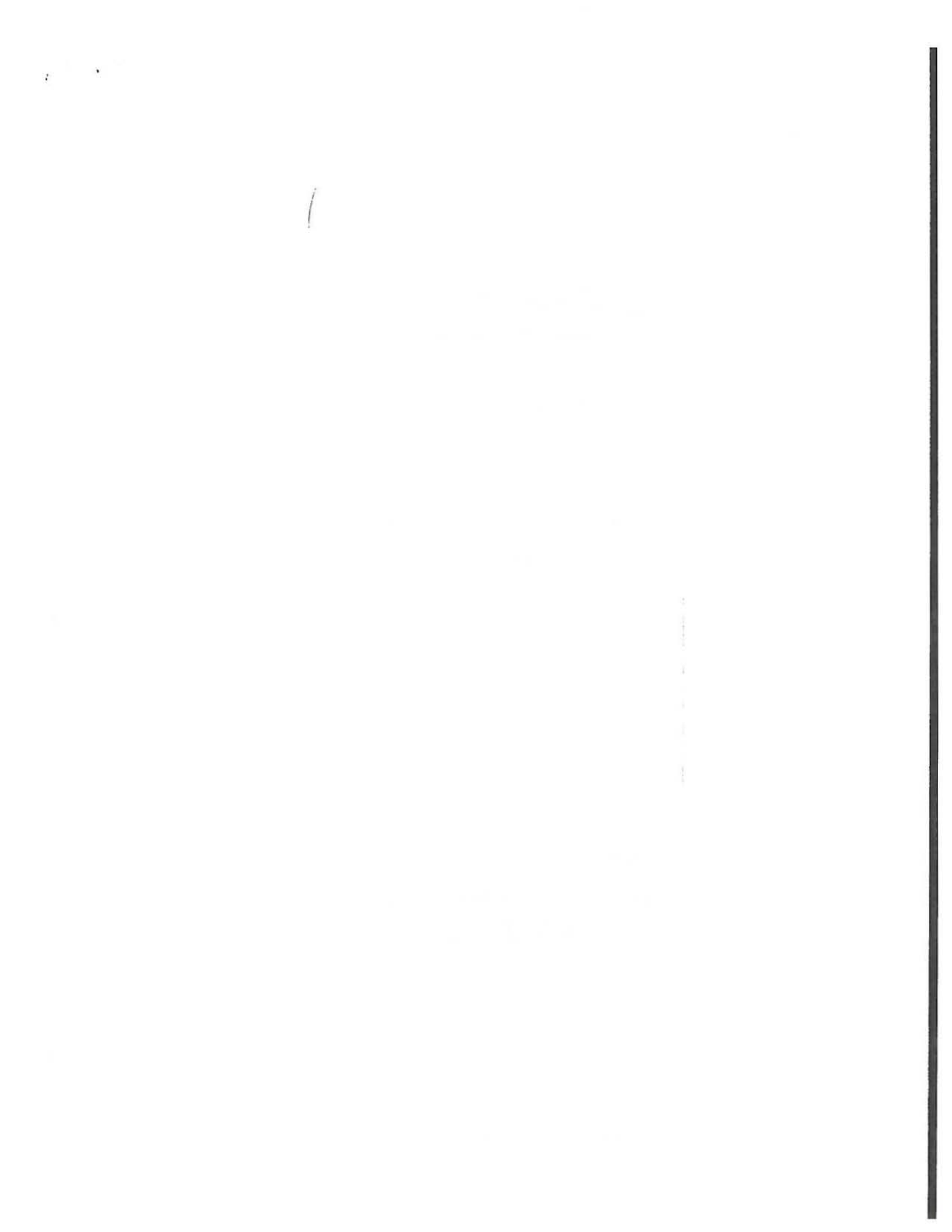
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Page 2

APPEAL DECISION
BEFORE THE HONORABLE MICHAEL L. WOLVERTON
Superior Court Judge

Anchorage, Alaska
November 20, 2008
10:06 a.m.

APPEARANCES:
FOR THE APPELLANT:

FOR THE APPELLEE:

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1 agreement by consuming alcohol and voluntarily surrendered his
2 Alaska license on March 7th of 1995.
3 After the voluntary surrender of his license on August
4 26th, 1995, Appellant committed a Class C felony assault against
5 Sergeant Cobb of the Anchorage Police Department. He was
6 subsequently convicted of this crime and imprisoned from August
7 1995 until April 1996. On July 29th, 1997, Appellant was
8 charged with operating a motor vehicle while intoxicated. On
9 September 22nd, 1997, Appellant pled no contest to driving while
10 intoxicated. Following this, Appellant was investigated for
11 practicing medicine without a license by the Division of
12 Corporations, Business and Professional Licensing in Alaska.
13 The division issued a cease and desist order on February 3rd,
14 1998 ordering Appellant to stop the illegal practice of
15 medicine.
16 On February 11th, 1999, Appellant pled guilty to two
17 counts of Assault in the Fourth Degree. After this, Appellant
18 moved to the State of Georgia where he was charged on February
19 9th, 2001 following an altercation with his girlfriend of
20 Disorderly Conduct. He pled guilty to the disorderly conduct
21 and was sentenced to one year probation.
22 Appellant filed an application for reinstatement of his
23 Alaska license on September 28th, 2005. The board denied this
24 application on January 12th, 2006. They cited the following
25 statutes and regulations as authority for denying Appellant's

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PROCEEDINGS

(No media number available)
10:06:05

THE COURT: They had to put this new monitor up, you can tell we're on record. Okay. We're on record in the time set for the court to enter its decision in 3AN-07-11710, Beirne vs. State of Alaska, medical board. And the parties are reminded you'll get a copy of the disc afterwards. This is a somewhat long and perhaps complicated decision because there were a lot of issues that the court had to address. But Madam Clerk is prepared to give you a disc before she leaves today and then give you a copy of the log-notes too. And you can make notes. I tend to read fast, so I'll try to make it as clear as possible.

Having considered the evidence, the documents, the administrative record and the arguments of the parties, the court is entering the following order. First, a brief summary of the facts. A very brief summary of the facts. Dr. Beirne, the Appellant, originally obtained medical licenses in both Arizona and Alaska in 1989. In 1991, he entered into a stipulation with the Arizona Board of Medical Examiners to voluntarily surrender his Arizona license. That same year in June of 1991, the Alaska State Medical Board -- the board entered into a memorandum of agreement with Appellant based on the Arizona surrender. Appellant subsequently violated this

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1 application. AS 864.240(b), AS 864.326(a)(4)(a), AS
2 864.326(a)(8)(b), AS 864.326(a)(13), 12 AAC 40.967(17) and 12
3 AAC 40.967(23). These basically indicated revocation or
4 suspension in another state. Addiction to alcohol, conviction
5 of the felony assault and violating provisions of any
6 disciplinary sanction issued under AS 8.64.
7 Appellant then requested an administrative hearing to
8 appeal that decision. This hearing took place on February 22nd,
9 2007. Appellant argued that while there are grounds in which
10 the Alaska board may deny his reinstatement, the statutes cited
11 by the board in their original denial do not mandate a denial.
12 Instead, the board should take into account his significant
13 rehabilitation and find him competent to practice medicine.
14 In his post hearing brief, appellee argued that 12 AAC
15 40.965(a)(1)(c) precluded the board from approving Appellant's
16 application. This regulation was not cited in the board's
17 original denial. Appellant argued that the interpretation of
18 the statute proposed by appellee that the board had no
19 discretion to reinstate if the applicant had committed grounds
20 for imposition of disciplinary sanctions following surrender of
21 his license was a potential violation of the due process clause
22 as it would be a permanent bar to re-licensing if interpreted in
23 that manner.
24 The administrative law judge prepared a proposed decision
25 on August 22nd, 2007 affirming the board's decision. The judge

<p>Page 6</p> <p>1 concluded that because Dr. Beirne practiced medicine without a 2 license after surrendering his license in 1995, the board had no 3 discretion to license him at this time so long as 12 AAC 4 40.965(a) is in effect, it -- in its present form, Dr. Beirne 5 cannot be licensed in this state. The board adopted to propose 6 decision on October 25th, 2007. Appellant appeals that 7 decision.</p> <p>8 The Appellant asked the court to reverse the holding of 9 the administrative law judge and the board and find that the 10 board must consider Dr. Beirne's application for reinstatement 11 under the standards of AS 864.334 taking into consideration Dr. 12 Beirne's alleged recovery from alcoholism and competency to 13 practice medicine. Appellant asked the court to review 10 14 issues. At least those were the issues the court seemed to find 15 in the filings.</p> <p>16 The first issue, Appellant argues that the ALJ's 17 conclusion that 12 AAC 40.965(a)(1)(c) operated to permanently 18 bar him from regaining his license was in error. Appellant 19 argues that this conclusion is contrary to AS 864.334 which 20 expressly allows reinstatement upon proof of competency and 21 fitness to return to work. AS 864.334 addresses voluntary 22 surrenders of licenses and states that a license may not be 23 returned unless the board determines that the licensee is 24 competent to resume practice. Appellant argues that the ALJ's 25 conclusion was in error because nothing in the statute refers to</p>	<p>Page 8</p> <p>1 licenses is not unreasonably withheld or delayed.</p> <p>2 Appellant argues that the board violated this statute when 3 it adopted a regulation that provides for a penalty not included 4 in the governing statute. Therefore, the regulation exceeded 5 the board's statutory authority rendering it invalid. Appellee 6 argues that the regulation issue is presumptively valid.</p> <p>7 Appellee argues that under AS 864.334, the legislature intended 8 that the board establish by regulation the criteria for 9 determining whether an applicant for reinstatement is competent 10 through resumed practice. One of the criteria adopted by the 11 board under regulation 12 AAC 40.965(a)(1)(c) is that an 12 applicant for readmission must have committed no grounds for 13 discipline since his surrender.</p> <p>14 Appellant argues that the mere fact that there are some 15 criteria to licenser that have the effect of permanently 16 disqualifying the applicant does not make the criteria invalid. 17 Furthermore, the apparent harsh treatment is valid as 18 petitioner's for reinstatement generally should be held to an 19 even higher standard of conduct on first time applicants because 20 they have already demonstrated that they are at risk for 21 unethical conduct. Thus the criteria for reinstatement 22 established by 12 AAC 40.965(a) is consistent with AS 864.334 23 and with the board's duty to protect the public.</p> <p>24 The fourth issue argued by Appellant is that the 25 application of 12 AAC 40.965(a)(1)(c) to Dr. Beirne's prior acts</p>
<p>Page 7</p> <p>1 a lifetime and permanent ban.</p> <p>2 The second issue Appellant argued that -- was that the 3 ALJ's ruling, that 12 AAC 40.965(a)(1)(c) left the board no 4 discretion to grant reinstatement was in error because that 5 regulation is inconsistent with and not necessary to carry into 6 effect the governing statute. Appellant cites AS 44.62.030 and 7 argues when a regulation conflicts with a statute, it is the 8 regulation that must yield. Appellant argues that when the 9 board adopted 12 AAC 40.965(a)(1)(c), that exceeded its 10 authority because the governing statute does not contain a 11 similar provision allowing for a permanent bar on reinstatement. 12 Appellant recognizes that the board has the authority to adopt 13 any and all regulations necessary to carry into effect the 14 provisions of the statute, but argues that the regulation in 15 question is inconsistent with and not reasonably necessary to 16 implement AS 864.334.</p> <p>17 The third issue argued by Appellant was that the board's 18 enactment of 12 AAC 40.965(a)(1)(c) was in excess of its 19 statutory authority making the regulation invalid. Appellant 20 cites the enabling statute AS 864.100, which reads the board may 21 adopt regulations necessary to carry into effect the provisions 22 of this chapter. Furthermore, Appellant argues that AS 864.101, 23 which outlines the duties of the board specifically provides 24 that the board may not make licensing requirements that are 25 unreasonably burdensome and must ensure that the issuance of</p>	<p>Page 9</p> <p>1 that were a result of his alcoholism and drug dependence is a 2 violation of Title Two of the American's with Disabilities Act. 3 Appellant cites Title Two of the American's with Disabilities 4 Act, 42 US C, section 12132(2), which provides that no qualified 5 individual with a disability shall by reason of such disability 6 be excluded from participation in or be denied the benefits of 7 the services, programs or activities of a public entity or be 8 subjected to discrimination by any such entity. Appellants 9 argues that he meets the definition of a qualified individual 10 with a disability as alcoholism is a recognized disability under 11 the ADA.</p> <p>12 Appellant asserts that the board's denial of his 13 application for reinstatement was impermissibly based on this 14 disability. Appellant asserts that Dr. Beirne's behavior in the 15 late 1990's including the allegation that he practice medicine 16 without a license were all a direct result of his alcoholism and 17 drug dependence. Therefore, when the board relied on his past 18 behavior as grounds for denying Appellant's application under 12 19 AAC 40.965(a)(1)(c), it was a violation of the ADA.</p> <p>20 Appellee argues that the ADA does not apply to this 21 situation. First, Appellant is not entitled protection under 22 the ADA because the state is permitted to discriminate against 23 individuals whose disability constitutes a direct safety threat 24 to the public. Furthermore, appellee argues that the board's 25 denial of Appellant's application was not based on his</p>

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1 disability. Rather, the board's denial was based on Appellant's
 2 conduct following the surrender of his license. Appellee
 3 concludes then that from a legal and factual standpoint, the ADA
 4 has no application to this matter.
 5 The fifth issue Appellant argues was that AS 864.334
 6 requires that the board consider the applicant's current
 7 competency to practice medicine when reinstatement is sought.
 8 Appellant presented significant evidence concerning his current
 9 health status and his current fitness to practice medicine and
 10 argues that the board ignored this evidence and thereby
 11 committed the legal error by depriving him of his ability to
 12 ever regain a license.
 13 The sixth issue Appellant argues state -- Appellant states
 14 that the Alaska Supreme Court has held that it endorses the
 15 bridging of excessive administrative discretion to ensure a fair
 16 administrative process. Appellant then argues that the board's
 17 decision to refuse to reinstate his medical license was
 18 excessive and punitive especially given the fact that the
 19 controlling statute, AS 863.334 requires the board to consider
 20 Dr. Beirne's competency. When the board chose to ignore
 21 evidence of Appellant's regained competency and instead chose to
 22 invoke the punitive provision of 12 AAC 40.965(a)(1)(c), this
 23 constituted legal error.
 24 Appellee argues that contrary to Appellant's claim, the
 25 board did in fact consider evidence of Appellant's current

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1 health status and current fitness to practice medicine, however,
 2 this evidence was not this positive because Appellant's illegal
 3 conduct rendered him ineligible for reinstatement. Because 12
 4 AAC 40.965(a)(1)(c) rendered Appellant ineligible for
 5 reinstatement, the board could not take into account his current
 6 health status and current fitness to practice medicine.
 7 The seventh issue raised by Appellant was that his right
 8 to equal protection under the law has been violated. He asserts
 9 that under Alaska's sliding scale approach, the right to engage
 10 in economic endeavor is an important right that the government
 11 may impair only if its interest in taking the challenged action
 12 is important and the nexus between the action and the interest
 13 it serves is close. Appellant asserts that not -- denying him
 14 the ability to obtain a medical license concerns his right to
 15 engage in an economic endeavor. Appellant argues that 12 AAC
 16 40.965(a)(1)(c) violates equal protection because it
 17 irrationally denies licenses to individuals who commit an
 18 offense while they are unlicensed while imposing no similar
 19 mandatory penalty on an individual who commits the same offense
 20 while they are licensed.
 21 Appellant further argues that there is no reasonable,
 22 rational distinction between licensed and unlicensed individuals
 23 who commit an act that constitutes grounds for imposition of
 24 disciplinary sanctions under AS 864.326 and the unequal
 25 application of penalties for such a violation based solely on a

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1 person's license status violates equal protection. Appellant
 2 argues that a physician who surrenders his license voluntarily
 3 and a physician who keeps his license are similarly situated
 4 because 1) the voluntary surrender of a license under AS 864.334
 5 does not require any wrongdoing on the part of a physician and
 6 2) the physician who keeps his license may have also engaged in
 7 misconduct warranting discipline. Because 12 AAC
 8 40.965(a)(1)(c) discriminates between Dr. Beirne, who
 9 voluntarily surrendered his license, then committed acts that
 10 may have violated AS 864.326 and a physician who kept his
 11 license and then violated AS 864.326 had violated the Alaska
 12 constitution's guarantee of equal protection.
 13 Appellee argues that Appellant's equal protection rights
 14 were not violated because Appellant failed to identify a class
 15 of similarly situated persons who were treated differently
 16 because of the regulation. Simply put, a physician whose
 17 conduct renders himself unfit so as to require surrender of his
 18 license who then continues to violate AS 864.326 and then seeks
 19 reinstatement of that surrendered license is not in the same
 20 class as a licensed physician who commits an act under AS
 21 864.326. Because the two classes are not similarly situated,
 22 the different legal treatments of the two classes is justified
 23 and there is no violation of the equal protection clause.
 24 The eighth issue cited by Appellant concerns Article I,
 25 section 7 of the constitution, which states under the Alaska

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1 constitution substantive due process is denied when a
 2 legislative enactment has no reasonable relationship to a
 3 legitimate governmental purpose. Appellant argues that
 4 substantive due process is lacking in this because 12 AAC
 5 40.965(a)(1)(c) has no reasonable relationship to any legitimate
 6 government purpose and reliance on this regulation by the board
 7 resulted in the arbitrary denial of Dr. Beirne's license. The
 8 denial was not based on any rational policy considerations, was
 9 contrary to the governing statute AS 864.334 and therefore
 10 constituted a denial of due process.
 11 Appellant also argues that the board's action was a
 12 violation of his procedural due process rights. He argues the
 13 private interest effected the Appellant's ability to engage in
 14 his chosen profession is a substantial one and that the risk of
 15 erroneous deprivation of this interest by application of 12 AAC
 16 40.965(a)(1)(c) is high. Appellant argues that the elimination
 17 of an individual consideration of each applicant's particular
 18 circumstances by the board virtually guarantees that at some
 19 point an otherwise competent physician will be denied the
 20 ability to practice medicine based on factors that would
 21 otherwise not actually impair the ability of that physician to
 22 practice medicine.
 23 And finally, that the government's interest -- hang on --
 24 and finally, that the government's interest is minimal.
 25 Appellant argues that the only additional action required by the

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1 board would be genuine consideration of his circumstance rather
2 than an automatic denial based on 12 AAC 40.965 (a)(1)(c).

3 Appellee argues that Appellant's due process rights were
4 not violated as only licensees have a sufficient property
5 interest to qualify for the protection of due process.
6 Furthermore, appellee argues courts and other jurisdictions have
7 held that there is no property interest and therefore no due
8 process rights in a revoked or surrendered license. Finally,
9 appellee asserts Appellant's procedural due process rights were
10 not violated because he received all the rights due to him under
11 the Administrative Procedure Act.

12 The ninth issue argued by Appellant is that the real
13 question that should have been addressed by the board was
14 whether or not Dr. Beirne was competent to resume his practice
15 of medicine pursuant to AS 864.334 and that the board should
16 have considered the evidence offered by Appellant that reflected
17 on his rehabilitation and current competence. Appellant argues
18 because the board ignored this statute in favor of applying the
19 regulation, the evidence of competent was rendered irrelevant.
20 Appellant asserts this constitutes legal error.

21 The tenth issue that Appellant argues is that it was also
22 error for the board to refuse to reinstate Dr. Beirne's license
23 rather than reinstate it with limitations or conditions. The
24 board had the discretion to reinstate the license with
25 restrictions pursuant to 12 AAC 40.965(b)(c) and failure to do

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1 so was arbitrary and capricious. Appellant argues that the
2 board's decision should have been based on whether he had
3 regained his competence as required by AS 864.334 and not based
4 on conduct which took place after he surrendered his license but
5 while he was incompetent due to his disability.

6 Appellee argues that it was not error for the board to
7 refuse to reinstate Appellant's license with limitations or
8 conditions. Appellant had previously violated two agreements
9 with the board. A memorandum of agreement and the surrender
10 agreement and it hardly makes sense for the board to want to
11 enter into a third agreement with him. Appellee also argues
12 that additional grounds exist for affirming the board's
13 decision. The board could have denied Appellant's request under
14 12 AAC 40.965(a)(1)(b) and/or (d). Under subsection (b), a
15 denial would have been appropriate because Appellant does not
16 qualify for a medical license. Appellant's illegal practice of
17 medicine constituted unprofessional conduct under AS
18 864.326(a)(9) and 12 AAC 40.967(6). Based on this
19 unprofessional conduct, Appellant's application could have been
20 denied pursuant to AS 864.240(b).

21 Similarly, a denial under (d) would have been justified
22 because Appellant did not satisfy one of the conditions imposed
23 by the board to accept the surrendered license, i.e. his promise
24 not to practice medicine in Alaska. Likewise, Appellant's
25 application could have been denied based on 12 AAC

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1 40.965(a)(1)(a)(b) or (c) due to his felony assault conviction.

2 Judicial review of administrative orders looks at AS
3 25.27.220. There are four standards of judicial review for
4 administrative appeals. One, for questions of fact, the
5 substantial evidence test is employed. Under that test, the
6 court asks whether those findings are supported by such relevant
7 evidence as a reasonable mind might accept a supported
8 conclusion. The facts of this case do not appear to be at issue
9 and so that standard of review was not used.

10 For questions of law utilizing agency expertise, the court
11 uses the reasonable basis test. In those situations, the court
12 merely seeks to determine whether the agency's decision is
13 supported by the facts and has a reasonable basis and law even
14 if it may not agree with the agency's ultimate determination.
15 The third standard for questions of law where no agency
16 expertise is necessary, the court employs the substitution of
17 judgment test. Application of this standard permits a review in
18 court to substitute its own judgment for that of the agency even
19 if the agency's decision has -- had a reasonable basis in law.
20 The Alaska Supreme Court has stated although we ordinarily
21 review an agency's regulatory decision under the reasonable but
22 not arbitrary standard when the decision raises a question of
23 statutory interpretation involving legislative intent rather
24 than agency expertise, we review that question independently
25 applying the substitution of judgment standard.

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1 And the fourth standard used in reviewing administrative
2 appeals is for administrative regulations the reasonable and not
3 arbitrary test is used. This means that a court will defer to
4 the agency's interpretation unless it is plainly erroneous and
5 inconsistent with the regulation. As noted by the state in its
6 argument, even if the decision that 12 AAC 40.965(a)(1)(c) gave
7 them no choice was erroneous, the board could have denied
8 Appellant's request under 12 AAC 40.965(a)(1)(b) or (d). That
9 may well be an accurate statement, but those grounds were not
10 cited as the basis for not reinstating Appellant's license by
11 the ALJ as adopted by the board.

12 The court utilized the third and fourth standards in this
13 case based on the posture of the facts in the case. Validity of
14 administrative regulations. AS 44.62.030 addresses consistency
15 between regulations and statutes and states a regulation adopted
16 is not valid or effective unless consistent with the statute and
17 reasonably necessary to carry out the purpose of the statute.
18 The court begins with the presumption that the administrative
19 regulation is valid and the burden of proving otherwise is on
20 the challenger.

21 The role of the court is not to examine the content of the
22 regulation to judge its effectiveness, but to simply determine
23 whether the regulation is reasonable and necessary. When
24 administrative regulations interpreting licensing statutes
25 follow the general policy of the statutes, courts tend to uphold

4 (Pages 14 to 17)

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<p>those regulations. Some of amount of deference is given to the agency interpreting the statute especially where it involves matters within their expertise. And Alaska statutory scheme confers exclusive authority to grant or revoke licenses to the Alaska State Medical Board.</p> <p>The board is found -- or is normally held to be a competent body and their interpretation of the enabling statute should be given some deference. An agency's interpretation of its own regulations is reviewed under the reasonable basis standard and it is normally given effect unless plainly erroneous or inconsistent with the statute. The regulation in question here is 12 AAC 40.965. Appellant contends that this regulation is not consistent with the statutes authorizing the board to act. AS 8.64 at Sequitur (ph) specifically argues the regulation is contrary to AS 864.334 concerning the voluntary surrender of the license.</p> <p>AS 864.100 is the general statute giving the board power to adopt any regulations necessary for carrying out the provisions of Chapter 64. AS 8.01.075 and AS 8.64.331 set forth the possible disciplinary sanctions that the board may impose on a licensee including the power to permanently revoke a license to practice. AS 864.334 states that a license may not be returned unless the board determines under regulations adopted by it that the licensee is competent through resumed practice. Taken together, these statutes imply authority for the board to</p>	<p>state that.</p> <p>In fact, 12 AAC 40.965 subparagraphs (b) and (c) following and being separate from subparagraph (a)'s requirement imply reinstatement with limitations, conditions or probation can occur if the prerequisites for mandatory reinstatement of a surrendered license under (a)(1)(a), (b), (c) and (d) are not present. The interpretation that 12 AAC 49.965(a)(1)(c) is an absolute bar to licenser also is inconsistent with AS 864.331 allowing the board to reinstate suspended or revoked licenses after a hearing if they find the applicant is able to practice with reasonable skill and safety.</p> <p>Certainly the limitations on reinstatement of the voluntarily surrendered license should not be more onerous than reinstatement of a revoked license. The board should be free to determine whether an applicant for reinstatement is able to practice with reasonable skill and safety including with conditions, limitations and/or probation if necessary.</p> <p>Although this finding requires this case to be remanded to the board for review of Appellant's application without considering 12 AAC 40.965(a)(1)(a), (b), (c) or (d) as limiting the board's authority, that should not be interpreted as requiring the board not to consider (a), (b), (c) or (d) in reviewing Appellant's application for reinstatement. That argument was presented and rejected in a similar case regarding the licensing of attorneys. In Ray (ph), reinstatement of</p>
Page 19	Page 21
<p>adopt 12 AAC 40.965.</p> <p>The regulation in question was adopted under proper authority, is consistent with that authority and is reasonably necessary for carrying out the purposes of the enabling statute. However, the board's interpretation of 12 AAC 40.965 is plainly erroneous or inconsistent with the regulation. The board determined that the language in 12 AAC 40.965(a)(1) required that all four factors (a), (b), (c) and (d) must be met in order for a surrendered license to be reinstated. That is not what the regulation states. If (a)(1)(a), (b) (c) and (d) are met, the board must reinstate a surrendered license. If (a), (b), (c) and (d) are not met, the board could refuse to reinstate a surrendered license, but is not prohibited from doing so as subparagraphs (b) and (c) under that citation 40.965 could be employed.</p> <p>As this is the crux of the issues in this case, let me expand a bit. The board's interpretation of 12 AAC 40.965 appears more restrictive than the regulation requires. 12 AAC 40.965(a) states quote a license issued under this chapter that was voluntarily surrendered under AS 864.334 will be reinstated if and I end the quotes there, that is an affirmative order. If the requirements of subparagraph (a), (b), (c) and (d) are met, the board must reinstate the license, however, the opposite does not necessarily follow that the board cannot reinstate a license if (a), (b), (c) or (d) is not met. The regulation does not</p>	<p>Weiderholt (ph), the petitioner argued a rule which established moral fitness and lack of detrimental impact as the requirements for reinstatement of his law license that the only factors that could be considered in doing so. By the way, the cite for that case if you're not familiar with it is 24 P.3d 1219. It's an Alaska Supreme Court case from 2001.</p> <p>Weiderholt (ph) argued that it was an error for the board to consider his past conduct as only moral fitness and a lack of detrimental impact were listed. He argued that the use of the present tense verb has implied that the board should be determining whether the petitioner has the requisite qualifications at the present time rather than looking back to earlier conduct. The Supreme Court disagreed. They stated while Rule 29 establishes moral fitness and lack of detrimental impact as the requirements for reinstatement, it does not explicitly state what factors the board may take into account in determining whether a petitioner has satisfied these requirements.</p> <p>The court found that Weiderholt's (ph) prior conduct was highly relevant in determining his present moral fitness stating it makes little sense to consider a disbarred attorney's petition for reinstatement entirely in a vacuum, ignoring the conduct and attitude that led to disbarment. Like Weiderholt (ph), the statute here lists only one requirement for return of a surrendered license, competency. But the board is free to</p>

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1 consider other factors that reflect on the Appellant's current
 2 competency and past conduct is highly relevant to that
 3 determination. And in fact, they must under 12 AAC 40.965,
 4 consider those factors. They simply are not prohibited by that
 5 regulation from reinstating a surrendered license based on the
 6 presence of (a), (b), (c) or (d). They can, but are not
 7 required to.

8 Appellant raises several constitutional challenges to the
 9 proceedings in this case that need to be addressed prior to
 10 being returned to the board. First, for due process. The
 11 Alaska Supreme Court has stated in determining whether due
 12 process has been observed by an administrative agency of the
 13 State of Alaska, this court reviews the proceedings of the
 14 administrative body to assure that the trier of fact was an
 15 impartial tribunal, that no findings were made except on due
 16 notice and opportunity to be heard, that the procedure at the
 17 hearing was consistent with a fair trial and that the hearing
 18 was conducted in such a way that there is an opportunity for a
 19 court to ascertain whether the applicable rules of law and
 20 procedure were observed. The fundamental requirement of due
 21 process is the opportunity to be heard at a meaningful time and
 22 in a meaningful manner.

23 One Alaska case has specifically outlined the standard for
 24 reviewing both substantive and procedural due process claims.
 25 In *Keys vs. Humana Hospital of Alaska, Inc.* at 750 P.2d 343, an

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1 Alaska Supreme Court case from 1988, the court said substantive
 2 due process is denied when the legislative enactment has no
 3 reasonable relationship to a legitimate governmental purpose.
 4 The constitutional guarantee of substantive due process assures
 5 that a legislative body's decision is not arbitrary, but instead
 6 based on some rational policy. If any conceivable legitimate
 7 public policy free enactment is either apparent or offered by
 8 those defending the enactment, the party challenging it must
 9 disprove the factual basis for the justification.

10 For procedural due process, that same court stated due
 11 process is satisfied if the statutory procedures provide an
 12 opportunity to be heard in a court in a meaningful time and in a
 13 meaningful manner. Appellant received the requisite due process
 14 and all the actions undertaken by the board in this case. Based
 15 on the record, he received proper notice of all the actions
 16 taken against him. On 9-6-2006, Appellant received notice from
 17 the board regarding its meeting of January 12th, 2007. The
 18 notice contained provisions which informed him how to contest
 19 the board's decision by requesting an administrative hearing.
 20 The notice informed him of the time he had to appeal. When he
 21 requested an administrative review of the September 6th, 2006
 22 letter, a hearing was held before an administrative law judge on
 23 February 22nd, 2007.

24 At the hearing, the Appellant was not limited to the
 25 number of witnesses he could call. None of his testimony was

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1 excluded and he was not denied the opportunity to litigate the
 2 issues. The results of this hearing were published in a
 3 decision and order dated August 22nd, 2007. This decision and
 4 order informed Appellant of the process for appeal into this
 5 court. No findings made by the board appeared to have been made
 6 without giving Appellant due process. Adherence to the statute
 7 governing the board, consideration of all the evidence provided
 8 by Appellant and reflection of the applicable law. The
 9 establishment enforcement of the ALJ's order comply with
 10 constitutional due process. However, as discussed above, 12 AAC
 11 40.965 is not contrary to any governing statute. The court
 12 takes issue with the board's limitation of their ability to
 13 review applications for reinstatement.

14 Appellant also raised equal protection arguments. The
 15 Alaska constitution, Article I, Section I provides that all
 16 persons are entitled to equal rights, opportunities and
 17 protection under the law. The common question in equal
 18 protection cases is whether two groups of people who are treated
 19 differently are similarly situated and thus entitled to equal
 20 treatment. We ordinarily review a classification under Alaska's
 21 equal rights clause by asking whether a legitimate reason for
 22 dispar of treatment exists and given a legitimate reason,
 23 whether the enactment creating the classification bears a fair
 24 and substantial relationship to that reason.

25 In order for there to be a need to do an equal protection

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1 analysis, there must first be a finding that two similarly
 2 situated groups have been treated differently. If it is clear
 3 that two classes are not similarly situated, this conclusion
 4 necessarily implies that a different legal treatment of the two
 5 classes is justified by the differences between the two classes.
 6 Appellee argues that this is not case of two similarly situated
 7 groups, but of two dissimilar groups. If this is an act or
 8 analysis and the regulation bears a fair and substantial
 9 relationship to that reason, there is no need for further equal
 10 protection analysis.

11 Appellee asserts individuals who have voluntarily
 12 surrendered their license or postured differently from
 13 practitioner's who have not surrendered their licenses, the
 14 court would look to the similarity between individuals who are
 15 on criminal probation who are treated differently for new crime
 16 than those who were not already on probation who have committed
 17 a crime. Appellee considers those who have voluntarily
 18 surrendered their licenses to be subject to potentially greater
 19 sanctions or scrutiny than those who have not so surrendered
 20 their licenses.

21 The court does not disagree with that analogy, but given
 22 the decision that the board must reconsider Appellant's
 23 application, it is not prohibited from determining whether to
 24 reinstate his license. The issue is posture in this case
 25 appears moot. Individual evaluation of competence is required

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for practitioner's who have voluntarily surrendered the license	1
2 -- their license to practice. That is consistent with the	2 right, we'll be off record.
3 general requirements for first time offenders.	3 (Off record)
4 Finally, Appellant also raises the American with	4 10:42:24
5 Disabilities Act argument, that -- let's see -- the Alaska	5 END OF REQUESTED PORTION
6 Supreme Court has held that whether the agency complied with the	6
7 requirements of the ADA is a legal question not involving agency	7
8 expertise. Accordingly, the court would substitute their	8
9 judgment for that of the agency adopting the rule that is most	9
10 persuasive in light of precedent reason and policy. The facts	10
11 that an individual must show in order to prove a violation of	11
12 Title II of the ADA are 1) he is a qualified individual with a	12
13 disability, 2) he was either excluded from participation and/or	13
14 denied the benefits of a public entity services programs or	14
15 activities or was otherwise discriminated against by the public	15
16 entity and 3) such exclusion, denial of benefits or	16
17 discrimination was by reason of his disability.	17
18 Although Alaska cases were found addressing the issues,	18
19 several other 9th circuit courts have held that alcoholism is a	19
20 recognized disability under the ADA. Accepting that Appellant	20
21 due to his alcoholism is a qualified individual under the ADA,	21
22 it was not shown that the board's denial of his application was	22
23 based on his disability. The board offered legitimate reasons	23
24 for denying his application that were not based on his	24
25 disability and were not simply a pretext. The board's denial	25

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1 was based on Appellant's criminal conduct and practicing	
2 medicine without a license and failure to comply with the terms	
3 of his voluntary surrender of his medical license, all factors	
4 which the board must take into consideration per 12 AAC 40.965.	
5 Although Appellant argues all of his conduct was	
6 precipitated by his alcoholism and therefore should not be	
7 considered, it is not Appellant's disability that was considered	
8 by the board but his conduct. He does not get to engage in	
9 outrageous and illegal conduct without consequences under the	
10 ADA.	
11 For the reasons stated, the appeal is granted. The case	
12 is remanded back to the board for consideration of the	
13 Appellant's application. 12 AAC 40.965(a)(1)(a), (b), (c) and	
14 (d) can be considered in evaluating Appellant's application,	
15 however, they do not mandate denial of the application.	
16 And I apologize for the length of that. There were a lot	
17 of issues the court had to address and I've -- I felt an	
18 obligation to the board to try to address the concerns that the	
19 Appellant had raised that weren't necessarily just positive at	
20 this time so that they could know what the court has said and	
21 appeal if they feel that's appropriate. Madam Clerk will give	
22 you a copy of the disc. I know that was a lot of information	
23 and a lot of cites to regs, but I knew you guys were familiar	
24 with that already, so you kind of knew what I was talking about.	
5 And she'll give you a copy of her log-notes too hopefully. All	